

Message Text

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ORIGIN STR-07

INFO OCT-01 IO-13 ISO-00 STRE-00 AGRE-00 CEA-01
CIAE-00 COME-00 DODE-00 EB-08 FRB-03 H-01 INR-10
INT-05 L-03 LAB-04 NSAE-00 NSC-05 PA-01 CTME-00
AID-05 SS-15 ITC-01 TRSE-00 ICA-11 SP-02 SOE-02
OMB-01 DOE-15 /114 R

DRAFTED BY STR:MPOMERANZ/MPRUITT
APPROVED BY STR:WKELLY/TPSC
AGRICULTURE:GWHITE/BENSON
STATE:JSPIRO
COMMERCE:DSCHLECHTY
LABOR:GPRATT/RSCHULMAN
TREASURY:JSCHOTT
OMB:LHAUGH/SFARRAR
DOD:JDARLING
STR:RHEIMLICH/RGERSON

-----008117 060455Z /65

P 060216Z APR 78
FM SECSTATE WASHDC
TO USMISSION GENEVA PRIORITY

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USMTN

E.O. 11652: N/A

TAGS: ETRD, MTN, JA

SUBJECT: GOVERNMENT PROCUREMENT SINGLE TENDERING

REFERENCE: GENEVA 04453

1. REFTEL INDICATES EC COMMISSION WILLING TO NARROW BRACK-
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ETED LANGUAGE IN SINGLE-TENDERING SECTION OF DRAFT GOVERN-
MENT PROCUREMENT CODE (MTN/NTM/W/133, PART 4, PARA. 15).
WE AGREE WITH MTN DEL THAT U.S. SHOULD CONSIDER ANY POTEN-
TIAL METHODS FOR ACHIEVING CONSENSUS ON THIS HEAVILY BRACK-
ETED SECTION OF THE TEXT AND ARE WILLING TO WORK WITH OUT-
LINES OF EC INTERNAL DIRECTIVE IF THIS WILL FACILITATE
ACCEPTANCE BY THE MEMBER STATES. EC DEL SHOULD BE ADVISED,

HOWEVER, THAT U.S. HAS SUBSTANTIAL OBJECTIONS TO SEVERAL PORTIONS OF ARTICLE 6(1)(A) THROUGH (E) OF THE INTERNAL DIRECTIVE AND WILL INSIST ON CLARIFYING AND TIGHTENING THESE PROVISIONS AS A CONDITION FOR UTILIZING THE DIRECTIVE AS A BASIS FOR DISCUSSIONS.

2. OBVIOUSLY THE INTERNAL DIRECTIVE MUST BE MODIFIED TO REFLECT OUR SUBSTANTIVE CONCERNS AND FIT IT INTO W/133. WE HAVE REVIEWED THE DIRECTIVE FOR THESE PURPOSES. THIS REVIEW HAS RESULTED IN THE FOLLOWING TEXT, WHICH SHOULD BE USED BY THE MTN DEL IN FUTURE DISCUSSIONS WITH EC DEL AND/OR

PLURILATERAL GROUP CONCERNING SINGLE-TENDERING. U.S. PROPOSAL SHOULD BE PORTRAYED AS A COMPROMISE SOLUTION OFFERED IN HOPES OF ACHIEVING EARLY CONSENSUS ON THE SINGLE-TENDERING PROVISIONS. EXPLANATORY NOTES CONCERNING EACH SUBPARA FOLLOW THE TEXT.

3. BEGIN TEXT: USE OF SINGLE TENDERING

15. THE PROVISIONS OF PARAGRAPHS 1-14 ABOVE GOVERNING OPEN AND SELECTIVE TENDERING PROCEDURES NEED NOT APPLY IN THE FOLLOWING CONDITIONS, PROVIDED THAT SINGLE TENDERING IS NOT USED WITH A VIEW TO AVOIDING MAXIMUM POSSIBLE COMPETITION OR IN A MANNER WHICH WOULD CONSTITUTE A MEANS OF DISCRIMINATION AMONG FOREIGN SUPPLIERS OR PROTECTION TO LIMITED OFFICIAL USE

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DOMESTIC PRODUCERS:

(A) IN THE ABSENCE OF TENDERS IN RESPONSE TO AN OPEN OR SELECTIVE TENDER, OR WHEN THE TENDERS SUBMITTED HAVE BEEN EITHER COLLUSIVE OR NOT CONFORMING TO THE ESSENTIAL REQUIREMENTS IN THE TENDER, OR FROM SUPPLIERS WHO DO NOT COMPLY WITH THE CONDITIONS FOR PARTICIPATION PROVIDED FOR IN ACCORDANCE WITH THIS AGREEMENT, ON CONDITION, HOWEVER, THAT THE REQUIREMENTS OF THE INITIAL TENDER ARE NOT SUBSTANTIALLY MODIFIED IN THE CONTRACT AS AWARDED;

(B) WHEN, FOR REASONS CONNECTED WITH PROTECTION OF EXCLUSIVE RIGHTS, SUCH AS PATENTS OR COPYRIGHTS, THE GOODS CAN BE SUPPLIED ONLY BY A PARTICULAR SUPPLIER AND NO REASONABLE ALTERNATIVE OR SUBSTITUTE EXISTS;

(C) INsofar as is STRICTLY NECESSARY WHEN, FOR REASONS OF EXTREME URGENCY BROUGHT ABOUT BY EVENTS UNFORESEEN BY THE PURCHASING ENTITIES, THE PRODUCTS COULD NOT BE OBTAINED IN TIME BY MEANS OF OPEN OR SELECTIVE TENDERING PROCEDURES;

(D) FOR ADDITIONAL DELIVERIES BY THE ORIGINAL SUPPLIER WHICH ARE INTENDED EITHER AS PARTS REPLACEMENT FOR EXISTING SUPPLIES OR INSTALLATIONS, OR AS THE EXTENSION OF EXISTING SUPPLIES OR INSTALLATIONS WHERE A CHANGE OF SUPPLIER WOULD COMPEL THE CONTRACTING AUTHORITY TO PURCHASE EQUIPMENT NOT MEETING REQUIREMENTS OF INTERCHANGEABILITY WITH ALREADY EXISTING EQUIPMENT, AND PROVIDED THAT HIGHLY SPECIALIZED TECHNICAL REQUIREMENTS MAKE IT IMPOSSIBLE TO RESORT TO OPEN OR SELECTIVE PROCEDURES.

4. CONCERNING LEAD-IN TO PARA 15, WE BELIEVE THE UNBRACKETED WORDING IN W/133 SHOULD STILL BE ACCEPTABLE TO ALL DELS, INCLUDING EC. SHOULD IT NOT BE, WE WOULD BE PREPARED

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TO CONSIDER SOMETHING CLOSE TO THE PREAMBLE TO THE EC DIRECTIVE PARAGRAPH.

5. SUBPARA (A) BORROWS FROM THE INTRODUCTION TO SUBPARA (A) OF THE EC DIRECTIVE. THEREFORE THE LANGUAGE IS LARGELY DRAWN FROM PARA 15(C) OF W/133 AND OECD TEXT PARA 14(1). IN ESSENCE THE DIFFERENCE BETWEEN OUR SUGGESTED TEXT AND THAT OF THE EC TEXT IS ONLY THAT REQUIRED TO ELIMINATE TEXT REFERENCES NEEDED FOR THE EC DIRECTIVE. THERE IS ONE EXCEPTION TO THIS AND THAT CONCERNS THE WORD "IRREGULAR". WE HAVE NOT YET HEARD A SUFFICIENT CASE FOR INCLUSION OF "IRREGULAR". A BID MIGHT POSSIBLY BE CONSIDERED IRREGULAR FOR SUCH REASONS AS THE FOLLOWING: (1) IT DOESN'T RESPOND TO THE INVITATION; (2) THE BIDDER HAS NOT BEEN QUALIFIED TO BID ON TECHNICAL OR FINANCIAL GROUNDS; (3) THE BIDDER HAS BEEN DISQUALIFIED FOR AN EARLIER FRAUD. IF THESE ARE WHAT THE EC IS ATTEMPTING TO ADDRESS BY THE WORD "IRREGULAR", OUR RESPONSE IS THAT THESE ARE ADDRESSED IN THE PARAGRAPH ITSELF AS WELL AS IN OTHER PARTS OF THE DRAFT CODE (E.G., PARA 3(F) AND PARA 14(E) OF W/133). IF THE EC HAS PROBLEMS OTHER THAN THESE WHICH IT WISHES TO ADDRESS WE ARE OF COURSE PREPARED TO EXAMINE THEM.

6. OUR PROPOSED SUBPARA (B) DIFFERS FROM EC TEXT FOR ONLY TWO REASONS. FIRST, WE CANNOT ACCEPT THE PHRASE "TECHNICAL OR ARTISTIC REASONS". WE DO NOT UNDERSTAND STATEMENT IN REFTEL PARA 3 THAT "TECHNICAL" IS "USED TO REFER TO THOSE PRODUCTS WHICH ARE OF A PROPRIETARY NATURE". IF EC MEANS TO REFER TO PRODUCTS WHICH ARE NOT COVERED BY INDUSTRIAL PROPERTY RIGHTS (INCLUDING UNPATENTED SECRET KNOW-HOW) THEN THE GOODS MUST BE IN THE PUBLIC DOMAIN AND THERE IS NO NEED TO GO TO A SOLE SOURCE -- OPEN OR SELECTIVE TENDERING SHOULD THEREFORE DO THE JOB. FURTHER, IF

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THE INTENTION IS TO ADDRESS THE COMMISSIONING OF A WORK OF ART, THAT WOULD BE A PROCUREMENT FOR A SERVICE RATHER THAN A GOOD, AND WOULD THEREFORE BE OUTSIDE THE SCOPE OF THE CODE. IF THE CONTRACT IS FOR A REPRODUCTION OF A WORK OF ART, THAT WOULD BE A PROCUREMENT FOR A COPYRIGHTED GOOD AND WOULD THEREFORE COME WITHIN THE SCOPE OF THE TEXT SUBPARA WITHOUT THE NEED OF A SPECIFIC REFERENCE. SECONDLY, THE TEST MUST ALWAYS BE APPLIED TO DETERMINE WHETHER THE PROCUREMENT NEED CAN ONLY BE SATISFIED BY A PROPRIETARY GOOD. CLEARLY FOR MOST PHOTOGRAPHIC PURPOSES A CAMERA OTHER THAN A KODAK CAN DO EQUALLY AS WELL. WE MUST PUT ON THE PROCUREMENT AGENCY THE REQUIREMENT THAT A SUBSTITUTE PRODUCT POSSIBILITY MUST BE EXAMINED BEFORE RECOURSE TO SINGLE TENDERING UNDER THIS SUBPARA.

7. SUBPARA (C) IS A COMBINATION OF THE EC DIRECTIVE'S SUBPARA (D) AND PARA 15 (D) OF W/133. AS NOTED IN REFTTEL, REFERENCE TO TIME LIMITS IN THE INTERNAL DIRECTIVE WOULD BE INAPPROPRIATE IN MTN CODE.

8. ANY VARIANCE BETWEEN OUR TEXT AND THAT OF THE EC DIRECTIVE SUBPARA (E) IS BASED ON OUR INSISTENCE THAT STANDARDIZATION, IN ITSELF, IS NOT A SUFFICIENT BASIS FOR GOING TO SINGLE TENDERING. IT IS ENTIRELY POSSIBLE, THOUGH SELECTIVE TENDERING, TO FIND A VARIETY OF SUPPLIERS WHO WOULD BE WILLING TO PRODUCE REPLACEMENT PARTS TO THE SPECIFICATIONS OF THOSE ALREADY IN PLACE. THE TEXT RESPONDS TO THE ONLY BASIS FOR GOING SOLE SOURCE -- THERE MUST BE "HIGHLY SPECIALIZED TECHNICAL REQUIREMENTS WHICH MAKE IT IMPOSSIBLE TO RESORT TO OPEN OR SELECTIVE PROCEDURES."

9. WE ARE UNABLE TO PROVIDE A TEXT TO CORRESPOND TO EC DIRECTIVE SUBPARA (C). WE ARE AWARE THAT A RESEARCH CONTRACT DOES SOMETIMES RESULT IN THE CREATION OF A PRODUCT. BUT RESEARCH CONTRACTS ARE OUTSIDE THE CODE AND THE FACT THAT A PRODUCT RESULTS FROM THE RESEARCH EFFORT DOESN'T

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BRING IT BACK UNDER THE CODE. THE TERM "MANUFACTURED" CONNOTES CONSTRUCTION OF MORE THAN A PROTOTYPE. ONCE THE PROTOTYPE RESULTS FROM THE RESEARCH WE CAN CONCEIVE OF NO REASON WHY SELECTIVE OR OPEN TENDERING CANNOT BE USED FOR SECURING ADDITIONAL COPIES. CLEARLY THIS IS A CASE OF WHERE THE EC WILL HAVE TO BE MORE SPECIFIC AS TO ITS PROBLEM BEFORE WE CAN RESPOND FURTHER. MAYBE EC REDRAFTING

EFFORT REPORTED IN REFTTEL WILL CLEAR UP THIS ASPECT.

10. WE ARE PLEASED THAT EC COMMISSION IS READY TO MOVE
TOWARDS CONSENSUS ON SINGLE-TENDERING EXCEPTION AND
ENCOURAGE MTN DEL TO PUSH THIS ISSUE DURING PLURILATERALS
WEEK OF APRIL 10. VANCE

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Message Attributes

Automatic Decaptioning: X
Capture Date: 01 jan 1994
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: GOVERNMENT PROCUREMENT, TEXT, DISPUTE SETTLEMENT, CONTRACTS
Control Number: n/a
Copy: SINGLE
Draft Date: 06 apr 1978
Decaption Date: 01 jan 1960
Decaption Note:
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 20 Mar 2014
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1978STATE088239
Document Source: CORE
Document Unique ID: 00
Drafter: MPOMERANZ/MPRUITT
Enclosure: n/a
Executive Order: N/A
Errors: N/A
Expiration:
Film Number: D780148-0191
Format: TEL
From: STATE
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1978/newtext/t19780485/aaaactyd.tel
Line Count: 230
Litigation Code IDs:
Litigation Codes:
Litigation History:
Locator: TEXT ON-LINE, ON MICROFILM
Message ID: 08825cb5-c288-dd11-92da-001cc4696bcc
Office: ORIGIN STR
Original Classification: LIMITED OFFICIAL USE
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 5
Previous Channel Indicators: n/a
Previous Classification: LIMITED OFFICIAL USE
Previous Handling Restrictions: n/a
Reference: 78 GENEVA 4453
Retention: 0
Review Action: RELEASED, APPROVED
Review Content Flags:
Review Date: 05 may 2005
Review Event:
Review Exemptions: n/a
Review Media Identifier:
Review Release Date: N/A
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
SAS ID: 3052374
Secure: OPEN
Status: NATIVE
Subject: GOVERNMENT PROCUREMENT SINGLE TENDERING
TAGS: ETRD, JA, MTN
To: GENEVA USMTN
Type: TE
vdkgvwkey: odbc://SAS/SAS.dbo.SAS_Docs/08825cb5-c288-dd11-92da-001cc4696bcc
Review Markings:
Sheryl P. Walter
Declassified/Released
US Department of State
EO Systematic Review
20 Mar 2014
Markings: Sheryl P. Walter Declassified/Released US Department of State EO Systematic Review 20 Mar 2014